No. 712

In the

Supreme Court of the United States

ANDREW JACKSON PATTERSON AND EVELYN DEWITT,
Appellants,

v.

CITY OF DALLAS,
Appellee.

On Appeal From the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the Judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, entered on February 23, 1962; a Motion for Rehearing which was overruled; an Application for a Writ of Error to the Supreme Court of Texas which was denied on July 25, 1962; and a Motion for Rehearing on Application for Writ of Error which was denied on October 3, 1962.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas is reported in Tex. Civ, App. , 355 S. W. 2d 838. The opinion is attached hereto as Appendix A.

JURISDICTION

1. This is an appeal from a decision of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas affirming the Judgment of the 14th Judicial District Court of Texas, refusing Appellants injunctive relief from the operation and effect of a municipal ordinance of the City of Dallas, Texas. The judgment of the 14th Judicial District Court of Texas is unreported and is attached hereto as Appendix B. The Court of Civil Appeals for the Fifth Supreme Judicial District of Texas handed down its opinion on February 23, 1962. Appellants' Motion for Rehearing was denied on March 16, 1962. Subsequently, Appellant filed Application for Writ of Error with the Supreme Court of Texas, which was denied on July 25, 1962. Appellants' Motion for Rehearing on said Application for Writ of Error was denied by the Supreme Court of Texas on October 3, 1962. Because the Supreme Court of Texas refused to grant Appellants' Application for Writ of Error, the Court of Civil Appeals is the highest court of the state in which a decision could be had.

2. The jurisdiction of this Court upon appeal is conferred by *28 U.S.C.A. § 1257 (2)*. Appellants challenge the validity of a municipal ordinance of the City of Dallas, Texas, a

"statute of a state", within the meaning of that provision, on the ground that, as applied to Appellants, it is repugnant to the Constitution of the United States, and the decision of the highest Court of the State was in favor of its validity.

3. Cases believed to sustain the jurisdiction of this Court to review by appeal the decision of the Court of Civil Appeals include: *Panhandle Eastern Pipe Line Co. v. Robert S. Calvert, 347 U.S. 157, 98 L. Ed. 583, 74 S. Ct. 396; Lovell v. Griffin, 303 U. S. 444, 82 L. Ed. 949, 58 S. Ct. 666; Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. 78, 28 S. Ct. 7.*

STATUTE INVOLVED

The municipal ordinance of the Appellee which is specifically under attack here is more particularly designated as *Section 8-28* of the Code of Civil and Criminal Ordinances of the City of Dallas, Texas. Said ordinance is as follows:

> "It shall be unlawful for any person to administer a massage as defined in Section 8-12 to any person of the opposite sex; provided, however, that this Section shall not apply to any Chiropractor, nor shall it apply to any registered physical therapists, or registered nurse operating under the direction of a physician. (Ord. 7865, §15; Ord. 8491, §1.)".

Section 8-12 of the Code of Civil and Criminal Ordinances of the City of Dallas, Texas, is as follows:

> "For the purposes of this article the following words and phrases shall have the meanings respectively ascribed to them by this section:
>
> "Massage shall mean and include any process consisting in kneading, rubbing or otherwise manipulating

the skin of the body of a human being, either with the hand or by means of electrical instruments or apparatus, or other special apparatus, but shall not include massage by duly licensed physicians, nor massage of the face practiced by duly licensed beauty parlors or barbershops.

"Massage establishment shall mean any building, room, place or establishment other than regularly licensed hospital where manipulated massage or manipulated exercises are practiced upon the human body by anyone not a duly licensed physician, whether with or without use of mechanical, therapeutic or bathing devices, and shall include Turkish Bathhouses. This term shall not include, however, beauty parlors or barbershops duly licensed under the Penal Code of the state or registered physical therapists who treat only patients recommended by a licensed physician and who operate only under such physician's direction. (Ord. 7865, §1; Ord. 8458, §1.)"

QUESTIONS PRESENTED

1. Whether, as applied to Appellants, Section 8-28 of the Code of Civil and Criminal Ordinances of the City of Dallas, Texas, is violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether, as applied to Appellants, Section 8-28 of the Code of Civil and Criminal Ordinances of the City of Dallas, Texas, is violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

Appellants conduct a business in the nature of a massage establishment within the City of Dallas, Texas. The Appellants employ several skilled and trained women to pursue their occupations as masseuses and Appellants' clientele is predominately men. Appellee enacted a comprehensive ordinance regulating licensing and stringently controlling the health and morals of all engaged in this type of business. Among the provisions of this ordinance is Section 8-28 which has the effect of destroying Appellants' business. Appellants brought suit to enjoin the enforcement of this section of Appellee's ordinance and in their original petition to the trial court alleged that Section 8-28 of Appellee's ordinance denied Appellants' rights to equal protection of the laws and further deprived Appellants of liberty and property without due process of law, all of which was contrary to the Fourteenth Amendment to the Constitution of the United States. The trial court, whose judgment is attached hereto as Appendix B, refused Appellants injunctive relief and Appellants appealed to the Court of Civil Appeals, raising the federal questions here involved. Appellants' Application for Writ of Error to the Supreme Court of Texas raised the federal questions here involved. The fact that the federal questions were adequately and properly raised was recognized by the Court of Civil Appeals in its opinion. (See Appendix A.)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The municipal ordinance of Appellee violates the Due Process Clause of the Fourteenth Amendment in that it is arbitrary and unreasonable in the extreme. The employees of

Appellants, who are women, are prohibited from administering a massage to any man; consequently, no degree of scientific training or professional skill (short of the very limited areas excepted from the ordinance), moral fitness or other quality will allow Appellants' employees to pursue their lawful occupation as to a male clientele.

In the case of *Smith v. State of Texas, 233 U. S. 630, 58 L. Ed. 1129, 34 S. Ct. 681*, this Court reversed the conviction of Smith who had been found guilty of the offense of violating a Texas statute which made it unlawful for any person to act as conductor of a freight train without having previously served for two years as conductor or brakeman on such trains. Mr. Justice Lamar, speaking for the Court, said:

> "The necessity of avoiding the fixing of arbitrary tests by which competent persons would be excluded from lawful employment is also recognized in Smith v. Alabama, 124 U. S. 465, 480, 31 L. Ed. 508, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. There the act provided that all engineers should secure a license, and in sustaining the (638) validity of the statute the court pointed out that the law 'requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed, or prescribe any arbitrary conditions of the grant.' This and the other cases establish, beyond controversy, that, in the exercise of the police power, the state may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety. The liberty of contract is, of course, not unlimited; *but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to*

labor on terms mutually satisfactory to employer and employee. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve, and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves." (Emphasis supplied.)

This constitutional provision has been declared by this Court to mean, "not only the right of the citizen to be free from mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation." *Allgeyer v. Louisiana, 165 U. S. 578, 41 L. Ed. 832, 17 S. Ct. 427; Meyer v. Nebraska, 262 U. S. 390, 67 L. Ed. 1042, 43 S. Ct. 625.* The right thus granted is, of course, subject to the police power of the state to enact laws essential to the public safety, health or morals; but to justify a state in exercising such authority, it must appear that the interest of the public requires such interposition, and that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive to individuals. "The Legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose undue and unnecessary

restrictions upon lawful occupations." *Lawton v. Steele, 152 U. S. 133, 38 L. Ed. 385, 14 S. Ct. 499.*

The ordinance of Appellee in question discriminates against Appellants in that it dictates who their customers may be by eliminating all of Appellants' male customers. "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 37, 38, 72 L. Ed. 770, 774, 48 S. Ct., 423; Hartford S. B. I. Ins. Co. v. Harrison, 301 U. S. 459, 462, 81 L. Ed. 1223, 1226, 57 S. Ct. 838.*

The ordinance of Appellee in question does not treat all engaged in the business of professional massaging equally. The ordinance deprives the Appellants of customers without regard for their employees' qualifications, fitness, or ability, but solely on the arbitrary grounds of sex. In the case of *Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131, 36 S. Ct. 7,* Mr. Justice Hughes, speaking for this Court, said:

> "The act, it will be observed, provides that every employer (whether corporation, partnership, or individual) who employs more than five workers at any one time, 'regardless of kind or class of work, or sex of workers,' shall employ 'not less than 80 per cent qualified electors or native-born citizens of the United States or some subdivision thereof.' • • •
>
> "It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it

possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure.' (Cases cited) If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. * * *

"It is insisted that the act should be supported because it is not 'a total deprivation of the right of the alien to labor;' that is, the restriction is limited to those businesses in which more than five workers are employed, and to the ratio fixed. It is emphasized that the employer in any line of business who employs more than five workers may employ aliens to the extent of 20 per cent of his employees. But the fallacy of this argument at once appears. If the state is at liberty to treat the employment of aliens as in itself a peril, requiring restraint regardless of kind or class of work, it cannot be denied that the authority exists to make its measures to that end effective. (Cases cited) If the restriction to 20 per cent now imposed is maintainable, the state undoubtedly has the power, if it sees fit, to make the percentage less. We have nothing before us to justify the limitation to 20 per cent save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only 10 per cent of the employees to be aliens, or even a less percentage; or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. * * *

"* * * The restriction now sought to be sustained is such as to suggest no limit to the state's power of

excluding aliens from employment if the principle underlying the prohibition of the act is conceded."

It is respectfully submitted that the ordinance in question is invalid because it does not equally protect Appellants in its operation and effect when compared to others similarly situated in the business of operating massage establishments.

CONCLUSION

Appellants respectfully suggest that this appeal brings before this Court federal questions under the Constitution that are far-reaching and important, and that enough has been said to demonstrate that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT C. COX, certify that a copy of this Jurisdictional Statement has been served upon MR. TED P. MACMASTER, Assistant City Attorney, by delivering the same to him in the offices of the City Attorney, counsel of record for the City of Dallas, Appellee herein, located at 501 City Hall, Dallas, Texas.

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APPENDIX A

Opinion by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

"Appellants sought to enjoin the City of Dallas from enforcing the provisions of Section 8-28 of the Code of Civil and Criminal Ordinances of the City of Dallas, said Section of the City Code being a part of a comprehensive Ordinance regulating the operation of massage establishments. The Section of the Code under attack reads as follows:

> "'It shall be unlawful for any person to administer a massage as defined in Section 8-12 to any person of the opposite sex; provided, however, that this Section shall not apply to any Chiropractor, nor shall it apply to any registered physical therapists, or registered nurse operating under the direction of a physician. (Ord. 7865, §15; Ord. 8491, §1.)'

"Appellants alleged that they had procured a valid license under the provisions of the Code regulating massage establishments but contended that the above quoted section of the Code was unenforceable in that it was arbitrary, discriminatory and unreasonable, and also was in violation of the State and Federal Constitutions. The City, in its answer, contended that Section 8-28, as well as the entire Code regulating such massage establishments was enacted under express Charter powers and under the general exercise of its Police Powers to prohibit, abate and suppress all things detrimental to the health, morals, comfort, safety, convenience and welfare of the inhabitants of the City of Dallas.

"The trial court rendered judgment denying appellants' injunctive relief, specifically holding that the Section of the Code under attack was a reasonable exercise of the Police power of the City of Dallas and did not violate the Constitutional rights of appellants. From this order appellants appeal, contending in five points of error, that Section 8-28 should be declared invalid because (1) the Section complained of constitutes an unreasonable exercise of legislative authority of the City of Dallas; (2) that it constitutes an unreasonable regulatory act which is a prohibition of the occupation of appellants; (3) that the Ordinance violates and contravenes Section 3, Art. 1, of the Constitution of the State of Texas, Vernon's Ann.St.; (4) that the Ordinance contravenes Section 19, of Art. 1, of the Constitution of the State of Texas; and (5) that the Ordinance violates and contravenes the Fourteenth Amendment to the Constitution of the United States dealing with equal protection and due process of law. We are unable to agree with appellants on any of these points and therefore overrule them.

"Section 8-12 through Section 8-28 of the City of Dallas' Code of Civil and Criminal Ordinances constitutes a very comprehensive Ordinance dealing with the establishment and regulation of massage establishments. By its various Sections it is made unlawful for any person to operate a massage establishment without a license; requires an investigation by the Chief of Police as to the character, criminal record and general reputation for common decency of the applicant, or any employee; requires information to be supplied to the Health Department; requires medical certificates from the Health Department; governs appeals from

refusal to grant or renew a license; grant rights of inspection; establishes comprehensive sanitary requirement; and finally makes it unlawful for any person to administer a massage to any person of the opposite sex, with the named exceptions. The testimony is without dispute in this record that the appellants obtained a license to operate a massage establishment known as AVALON BATHS in the City of Dallas pursuant to the provisions of the regulatory Code described above. At the time the application was made for a license it was represented to the Police Department that only registered nurses or registered physical therapists operating under the direction of physicians were employed at the AVALON BATHS. It was stipulated that the AVALON BATHS does not have any registered physical therapists or registered nurses registered by the State of Texas operating under a duly licensed physician. Captain W. P. Gannaway, Captain of Detectives, and commanding officer of the Special Service Bureau of the Police Department of the City of Dallas testified that he had made an investigation of the AVALON BATHS and that same was being operated in violation of the Ordinance. He testified further that over the past several years the Police Department had an increase in problems confronting the Department with reference to the proper operation of massage establishments and that recommendations were made to the City for proper Ordinances to regulate same; that specifically the Police Department was confronted with a general problem that lewd acts were committed by the operators of the AVALON BATHS; that one of the appellants, Evelyn DeWitt, had been arrested at

another location for offering to commit a lewd act on one of the undercover agents of the City.

"That the City of Dallas had the right and authority to license and regulate persons or groups of persons engaged in business, occupation, profession or trade is not questioned. Section 5, Charter of the City of Dallas; Section 23, Art. 1175, Vernon's Ann.Civ.St. Appellants concede this authority but contend that this regulation by the municipal authority must be reasonable and not arbitrary or discriminatory. It is their contention that while the Police power of the City is broad and expansive, it must bear a reasonable and substantial relationship to the end sought to be achieved by the legislative body. The question is directly presented: Does Section 8-28 of the Code of Civil and Criminal Ordinances of the City of Dallas bear a reasonable and substantial relationship to the ends sought to be achieved by the legislating body, or does same arbitrarily establish a fixed Code of conduct which bears but a remote speculative and conjectural relationship to any valid results sought to be achieved under the Police power?

"To answer this question we are governed by the well-established rules which are succinctly stated by the court in Sitterle v. Victoria Cold Storage Co. (Tex. Civ. App.), 33 S. W. 2d 546, 549:

> " 'The power being expressly granted by the Legislature, the time for assuming and the manner of exercising it rest within the sound discretion of the governing board of the municipality. Under such authority, the board may determine the questions of the necessity of exercising the power, and of the method of giving effect thereto, and its determination of those questions

> is final and conclusive, and may not be revised by the courts, in the absence of clear and conclusive evidence that the board had acted arbitrarily and without reason. And in such situation the burden rests upon those aggrieved to make such showing.'

"Thus, we are not authorized to declare the Ordinance void vel non unless it clearly and unequivocally appears that the Ordinance was enacted without any basis of reason therefor. Moreover, we are governed by the well-established rule of construction of Statutes and Ordinances that a presumption exists that the legislative body has acted within its power. 12 Tex.Jur.2d § 42, p. 385; Chimine v. Baker, 32 Tex.Civ.App. 520, 75 S. W. 330; Houston & T. C. R. Co. v. City of Dallas, 98 Tex. 396, 84 S. W. 648, 70 L.R.A. 850.

"From the undisputed testimony of Captain Gannaway, and considering the record as a whole it is apparent that the Police Department of the City of Dallas was confronted with a real problem in the operating of massage establishments because of lewd acts committed or arising from the massaging of a person of one sex by a person of another sex. In an effort to correct this evil the Police Department of the City of Dallas made investigations and collected facts which were presented to the attention of the City Council of the City of Dallas with the recommendation that the Ordinance in question be passed in an attempt to curb the evil which then existed. It is to be observed that the Section under attack prohibits a member of one sex from administering a massage to a person of the opposite sex, with the exception noted. It does not prohibit, but permits, a masseur to administer a massage to a member of the male sex, and a masseuse

to administer a massage to a member of the female sex. The right to conduct a massage establishment, after complying with the Massage Ordinances and securing a permit, is not prohibited but is merely regulated. This record does not demonstrate failure on the part of the City Council to perform its legal functions. Appellants have failed to sustain their burden of proof to show that the Ordinance complained of was enacted without reason or that it was enacted arbitrarily.

"In construing a municipal ordinance we are governed by the same rules as to the construction of Statutes. Mills v. Brown, 159 Tex. 110, 316 S.W.2d 720; Town of Port Acres v. City of Port Arthur, (Tex.Civ.App.), 340 S.W.2d 325. In construing Legislative Statutes, as well as Ordinances, it is the duty of the court to ascertain the Legislative intent and this intent should be given effect if it is reasonable and not arbitrary. Popham v. Patterson, 121 Tex. 615, 51 S.W. 2d 680. Municipalities have the right to classify persons and the constitutional guarantee of equal rights and privileges to all citizens is not violated by discrimination provided there is a reasonable ground for such discrimination. Mims v. City of Fort Worth, Tex.Civ.App., 61 S.W.2d 539. Based upon these fundamental rules and applying them to the record in this case, we are of the opinion that the clear legislative intent of the City of Dallas in enacting the entire comprehensive regulatory statute was to protect the health and morals of the community. When viewed as a whole the

Ordinances are, indeed, reasonable and based upon fact and not fiction. As pointed out above there is a definite reasonable grounds for discrimination as provided in this Ordinance and the same is a fair exercise of Police Power of the City of Dallas.

"We have been cited to no Texas case adjudicating a similar worded Ordinance, nor have we found one by our research. However, the District Court of Appeals, 2d District of California, in the case of Ex parte Maki, 56 Cal.App. 2d 635, 133 P.2d 64, had before it for consideration an Ordinance of the City of Los Angeles which contains almost identical wording as the Ordinance under attack. That Ordinance made it unlawful for any person to administer, for hire or reward, to any person of the opposite sex any massage, alcohol rub or similar treatment. The Ordinance was attacked by Maki on the same constitutional grounds asserted in this case. The court, in rejecting the contention of the petitioner and holding the Ordinance to be valid and constitutional, said:

> "'The ordinance applies alike to both men and women. If petitioner should receive only male patrons and do his own work or employ only masseurs, he would not violate the ordinance. If he should receive only female patrons and employ only masseuses to do his work, there would be no violation. The barrier erected by the ordinance against immoral acts likely to result from too intimate familiarity of the sexes is no more than a reasonable regulation imposed by the city council in the fair exercise of police powers. In re Miller, 162 Cal. 687, 124 P. 427. * * *

"'In testing the legislative judgment with respect to the necessity for the enactment of regulatory laws in the absence of a judicial determination to the contrary, the presumption is that the city council's action was supported by known facts requiring the enactment. South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177, 625, 58 S. Ct. 510, 82 L. Ed. 734. Such presumption demands but little application here. The inclination of a percentage of mankind to ignore conventionalities, moral codes and inhibitory statutes and to indulge in licentious practices arising from the sex impulse is too well known to the student of history and sociology to require extended discussion. They have been prohibited in every land of recorded history from ancient Babylon (Code of Hammurabi) to the present time. The evil became so great a menace to the welfare of the early Saxon state in Britain that our rude forebears made adultery a capital offense. (Taine's History of English Literature.) By reason of the continued presence of such element whose lack of restraint would, by subverting the common morality, weaken the foundations of an approved social order, the Legislature may suppress the practice deemed inimical to the state and may adopt such measures as may be reasonable to effectuate its purpose. Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 33 S. Ct. 44, 57 L. Ed. 184; American Linseed Oil Co. v. Wheaton, 25 S. D. 60, 125 N. W. 127, 41 L. R. A., N. S., 149. Moreover, the fact that a particular transaction considered apart from the menace sought to be prevented may be innocuous, does not immunize it from the prohibition contained in the enactment. Since the ordinance in question does not prohibit either man or woman from engaging in the occupation of the masseur but merely regulates the conduct of a business in the interest of the state, there is no infraction of article XX of the Constitution.'

"The court also rejected the contention of the petition in that case that the ordinance violated the privileges and im-

munity clause of the Constitution of California, which is similar to Art. 1, Section 3, of the Constitution of the State of Texas, saying:

"'Petitioner contends that the ordinance violates section 21 of article 1 of the Constitution which forbids that "any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Those to whom special privileges are granted by the ordinance, asserts petitioner, are licensed physicians and their employees, in that those permitted to give massages are not selected upon the basis of their qualifications; that anyone may do so if he asks no reward for his service or if he is supervised by a licensed physician; that anyone may administer a massage so long as a masseur treats a man and a masseuse treats a woman; that a man may be treated by a masseuse and a woman by a masseur at the office of a physician. Such discrimination, argues petitioner, is not based upon some "natural, intrinsic, or constitutional distinction." Citing Gaetano Bocci & Sons Co. v. Lawndale, 208 Cal. 720, 284 P. 654, 655.

"'We find no violation of section 21 in the language of the ordinance. The physician is granted no special privilege thereby. He qualifies himself for such responsibility by his allegiance to time-honored ethical standards as well as by complying with the requirements of the state in gaining the knowledge and skill which qualify him to administer to the human body. The physician is obligated not only to adhere to the application of the most advanced methods and remedies in the art of healing but also to scorn immoral behavior and to denounce licentious practices. But not even he may act arbitrarily. He may cause a massage to be given only to those who in good faith seek his professional ministrations. The very act of the state in granting licenses to those only who are qualified as physicians is itself an attempt to prevent the quack

> and the charlatan from preying upon the unsuspecting public. There is, therefore, a distinction in the moral trustworthiness of the licensed physician, as a class, and the massagist. The latter has no professional standards to uphold. His endeavors are activated by only a personal zeal to promote his own prosperity.'

"Finally, the court rejected the contention of the petitioner that the ordinance violated a due process clause of the Constitution of California and the Fourteenth Amendment to the Constitution of the United States, saying:

> " 'The fallacy of petitioner's argument that the ordinance deprives him of his property without due process of law will already have occurred from the foregoing discussion. The reasonable exercise of the police power in regulating any occupation in order to maintain the moral welfare does not arbitrarily deprive a person so engaged of his property. The language of the ordinance and the evils intended thereby to be prevented make it clear that the intent of the city council was solely to serve the public welfare and not to oppress any class. The fact that a person by his occupation may be unable to gain certain profits as a result of the enforcement of regulatory measure is not a deprivation of his property without due process of law. Enactments that curb the vicious or restrain the wicked necessarily restrict the emoluments of his enterprise. However, such results are not to be considered in determining the validity of a law.'

"We think this case, so well decided, is decisive of the instant appeal.

"In determining the question of due process, equal rights, and discrimination, under both our State and Federal Constitutions it may be recognized that the Legislature may classify law violators and impose different penalties, inhibi-

tions and restrictions upon several classes, provided there is a reasonable basis therefor. In determining whether there is a reasonable basis for the classification there is a general presumption that the Legislature has done its duty, not violated the Constitution; and therefore the classification will be upheld unless it appears, clearly and without doubt, that it has no reasonable basis of support. Watts v. Mann (Tex. Civ.App.), writ ref. 187 S.W.2d 917.

"Mindful of these clear rules of construction, we are unable to agree with appellants that this ordinance was passed by the City Council of Dallas without having a reasonable basis of support in the matter of classification and equal protection of the law. Mims v. City of Fort Worth, Tex.Civ. App., 61 S.W.2d 539; Berry v. City of Fort Worth (Tex. Civ.App.), 110 S.W.2d 95; Hunt v. Cooper, 130 Tex. 433, 110 S.W.2d 896; James-Dickinson Farm Mortgage Co. v. Harry, 273 U.S. 119, 47 S.Ct. 308, 71 L.Ed. 569.

"Statutes of this state providing for separate classification of the sexes are not uncommon. Art. 5177, V.A.C.S. provides for separate toilets for each sex in factories, mills, workshops, mercantile establishments, laundries and other establishments. Art. 5178, V.A.C.S. prohibits management of an institution from permitting conditions to exist calculated to injuriously affect morals of female employees. The operation of a massage establishment renders them peculiarly subject to police regulations and prohibitions within the police power. Legislation based upon classification of the sex of the person does not constitute a new principle of constitutional law. The Supreme Court of the United States in Cronin v. Adams, 192

U. S. 108, 24 S. Ct. 219, 48 L. Ed. 365, and Cronin v. Denver, 192 U. S. 115, 24 S. Ct. 220, 48 L. Ed. 368, upheld a municipal ordinance of the City of Denver which prohibited liquor dealers from providing places where females could be supplied with liquor and from permitting females to be on or remain on the premises where liquor was sold.

"Appellants make an earnest argument that since Section 8-28 of the Code does not include the language 'for hire or reward' that the ordinance applies to other conceivable innocent situations such as prohibiting a husband from giving a massage to his wife, a parent from giving a massage to a child, and any of a number of situations. We cannot agree with appellants' theory of construction of the ordinance in question. It is a fundamental rule of statutory construction that words or phrases in a statute may be supplied, omitted or transposed in order to arrive at legislative intent and an interpretation should not be adopted that would thwart the legislative intent or lead to absurdity, injustice, or uncertainty if such construction can reasonably be avoided. Rogers v. Dallas Ry. & Terminal Co., Tex. Civ. App., 214 S. W. 2d 160, affm. 147 Tex. 617, 218 S. W. 2d 456; Hargrave v. Texas & P. Ry. Co. (Tex. Com. App.), 12 S. W. 2d 1009; Tone v. City of Denison (Tex. Civ. App.), 140 S. W. 1189; Roby v. Hawthorne (Tex. Civ. App.), 84 S. W. 2d 1108.

"The interpretation which appellants insist should be given to this ordinance would lead to absurd results. It is our opinion that when Section 8-28 is read in connection with the entire comprehensive ordinance that reasonable minds could not differ on the conclusion that it was the clear intent

of the City Council to apply this ordinance only to the situation under consideration; that is the operation and maintenance of massage establishments. Where the intention of a statute is not clearly expressed or is so inadequately expressed that the court must resort to construction, it is proper to consider the results of any proposed construction, and the court will, if possible, place upon the statute a construction which will not result in an injustice, inconvenience, unreasonableness, prejudice to public interest, or absurd consequences. National Surety Corp. v. Ladd, 131 Tex. 295, 115 S. W. 2d 600; McKinney v. Blankenship, 154 Tex. 632, 282 S. W. 2d 691; Wood v. State ex rel. Lee, 133 Tex. 110, 126 S. W. 2d 4, 121 A.L.R. 931.

"When the ordinance in question is considered in the light of the entire chapter regulating massage establishments in the City of Dallas, it is clear to us that the governing body of the City of Dallas intended, by the enactment of this ordinance, to prohibit lewd acts in such establishments. Such acts of lewdness was the very problem which confronted the Police Department, which resulted in an investigation and the recommendation to the City Council upon which is based the ordinance in question. The ordinance represents a reasonable application of the Police powers of the City of Dallas and bears a reasonable relation to the object sought to be obtained; and when construed in conjunction with the entire Code provisions is valid and constitutional.

"The judgment of the trial court is affirmed."

APPENDIX B

OPINION OF THE TRIAL COURT

No. 58916-A

ANDREW JACKSON PATTERSON AND EVELYN DEWITT d b a AVALON BATHS AND RAY KALANI d b a SHAR-RAY DIVERSIFIED ENTERPRISES,

Plaintiffs,

v.

CITY OF DALLAS,

Defendants.

In the 14th Judicial District Court of Dallas County, Texas

JUDGMENT

On this the 3rd day of April, A.D., 1961, the above styled and numbered cause came on to be heard at a regular setting thereof on Plaintiffs' Application for Temporary and Permanent Injunction wherein Defendant filed a Motion to Dismiss as well as its Answer wherein all issues were joined, and came the Plaintiffs, ANDREW JACKSON PATTERSON, EVELYN DEWITT and RAY KALANI, and the Defendant City of Dallas, by and through their respective attorneys of record and announced ready for trial and a jury being waived and all matters of fact as well as of law were submitted to the Court, and the Court, after hearing the evidence and arguments of counsel, is of the opinion and finds that the Ordinances of the City of Dallas regulating massage establishments constitute a reasonable exercise of the police power of the City of Dallas as well as a reasonable exercise of the specific authority vested in the City of Dallas by law

to enact such Ordinances which constitute a portion of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas and that such Ordinances are valid and constitutional as applied to Plaintiffs herein, and that Plaintiffs' Application for a Temporary and Permanent Injunction should be denied and Plaintiffs' Suit dismissed.

It is therefore, ORDERED, ADJUDGED and DECREED by the Court that Plaintiffs' Application for Temporary Injunction to enjoin the City of Dallas from enforcing Section 8-28 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas regulating massage establishments in the City of Dallas be and it is hereby denied and Plaintiffs' Suit be and it is hereby dismissed.

It is further ORDERED, ADJUDGED and DECREED that all costs in this proceeding be and they are hereby taxed against the Plaintiffs herein and from all of which Order and Judgment Plaintiffs excepted and gave notice of appeal to the Court of Civil Appeals in and for the Fifth Supreme Judicial District of Texas at Dallas.

SIGNED AND ENTERED this the 7-day of April, A.D., 1961.

/s/ Sarah T. Hughes
JUDGE

APPROVED AS TO FORM:
ERHARD COX AND RUEBEL
By /s/ Alfred L. Ruebel
Attorneys for Plaintiffs

H. P. KUCERA
TED P. MACMASTER
/s/ Ted P. MacMaster
Attorneys for Defendant